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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2179-14T1

BEVERLY FIGUEROA,

Plaintiff-Appellant/  
Cross-Respondent,

v.

UNION COUNTY SHERIFF'S  
DEPARTMENT, SHERIFF RALPH G.  
FROEHLICH, AND UNDERSHERIFF  
JOSEPH CRYAN,

Defendants-Respondents/  
Cross-Appellants.

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Argued December 6, 2016 - Decided February 3, 2017

Before Judges Yannotti, Kennedy, and Gilson.

On appeal from the Superior Court of New  
Jersey, Law Division, Union County, Docket No.  
L-0083-12.

Michael Farhi argued the cause for  
appellant/cross-respondent (Kates Nussman  
Rapone Ellis & Farhi, L.L.P, attorneys; Mr.  
Farhi and Cara Landolfi, on the briefs).

Elizabeth Farley Murphy argued the cause for  
respondents/cross-appellants Union County  
Sheriff's Department and Sheriff Ralph G.  
Froehlich (Bauch Zucker Hatfield, L.L.C,  
attorneys; Ms. Murphy, of counsel and on the  
briefs).

Kraig M. Dowd argued the cause for respondent/cross-appellant Undersheriff Joseph Cryan (Weber Dowd Law, L.L.C, attorneys; Mr. Dowd and Aleksandra Tasic, on the briefs).

PER CURIAM

Plaintiff Beverly Figueroa appeals from a November 17, 2014 order granting summary judgment to defendants Union County Sheriff's Department (UCSD), then-Sheriff Ralph Froehlich, and then-Undersheriff Joseph Cryan, and dismissing plaintiff's claims that defendants violated the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Defendants cross-appeal from a January 9, 2015 order denying their motion for fees and sanctions under N.J.S.A. 2A:15-59 and Rule 1:4-8. We affirm.

I.

We take the facts from the summary judgment record and view them in the light most favorable to plaintiff. Plaintiff first applied to become a sheriff's officer in 2000. As part of that process, she underwent a psychological evaluation. The evaluation concluded that plaintiff was "not mentally ill," but "appear[ed] to have longstanding personality problems that [were] likely to interfere with effective job performance." Accordingly, plaintiff was not placed on the list of eligible candidates. She appealed that decision, and the Merit System Board restored her to the

eligibility list. Plaintiff was then hired and in 2001 she began working as a sheriff's officer for UCSD.

Plaintiff has had a history of disputes with co-workers. In 2005, plaintiff was subject to discipline and she filed a grievance and a complaint alleging discrimination under the LAD. In 2006, that first LAD suit was settled and, in accordance with the terms of the settlement agreement, plaintiff was assigned a position in the legal processing unit of UCSD.

Over the next several years, plaintiff experienced problems with several co-workers in the processing unit. In particular, plaintiff did not get along with clerical co-worker Carol Gomez and Sheriff's Officer John Santora. Plaintiff complained that Santora often yelled "go-go." Santora's wife, who also worked at UCSD, came by to see Santora and would put her hands on her hips, start shaking, and then ask Santora for a dollar. Plaintiff perceived those actions as insults since she had worked as a go-go dancer before she became a sheriff's officer. Plaintiff acknowledged, however, that Gomez was referred to as "go-go" because of her last name, and that Santora's wife used the dollar she requested to buy coffee.

In 2009, plaintiff went to her local union representative to discuss the problems she was having with her co-workers. She complained that she thought that she was being harassed because

she was a female and because of her prior career as a go-go dancer. Plaintiff was advised that if she felt she was being discriminated against, she should take the matter to the affirmative action officer. Plaintiff did not file a discrimination complaint; rather, she requested her union representative to pursue the matter.

In May 2009, plaintiff met with her union representative, her supervisor, and Cryan. Plaintiff informed Cryan that Santora was bothering her by using the term "go-go" in her presence. According to plaintiff, Cryan told her that he did not want to hear about the matter and, if she made a complaint, she would be removed from the process unit. After some informal follow-up by the union representative, plaintiff decided not to pursue the matter further at that time.

On September 16, 2010, an incident occurred at the processing unit among plaintiff, Santora, and Gomez. Plaintiff entered the processing unit and Gomez and Santora yelled "go-go" and laughed. When plaintiff went to leave the unit, she had to walk past Gomez who was standing by a copying machine. According to plaintiff, Gomez turned around and said "watch this" and then threw several punches at plaintiff. Plaintiff dodged the punches and was not struck. Plaintiff then told Gomez that she would be in trouble and informed her "wait and see what happens to you."

The incident on September 16, 2010, engendered several reports from plaintiff, Gomez, and the supervisor of the processing unit. In her incident report, plaintiff reported that Gomez and Santora had started saying "go-go" and Gomez was "laughing and throwing punches at" plaintiff. Plaintiff did not state that this action was discriminatory; rather, she asked that Gomez and Santora be removed from the unit. Plaintiff also stated that she had contacted her attorney and the union representative, and would follow-up "with necessary paperwork."

Gomez reported that when she was by the copying machine, she made a gesture towards another person as plaintiff was walking past. According to Gomez, plaintiff then "threatened" Gomez and stated, "keep it up Carol and you will see what happens."

The reports concerning the incident on September 16, 2010, were given to Cryan. Cryan also met with the union representative. Cryan testified that in addition to discussing the incident between plaintiff and Gomez, the union representative informed him that plaintiff had told him that her county-issued car had been bugged by the UCSD.

On September 17, 2010, Cryan directed that plaintiff undergo a fitness-for-duty evaluation by Dr. Betty McLendon, a licensed psychologist. Cryan also placed plaintiff on administrative leave

pending completion of the evaluation and directed that her service weapon be taken away.

Plaintiff underwent the fitness-for-duty evaluation on September 21, 2010. McLendon issued her evaluation report on September 29, 2010. McLendon found that plaintiff's conduct and past history suggested "future risk for adjusting that may impact her [job] performance[.]" McLendon opined that plaintiff was "immature and decidedly narcissistic." McLendon recommended that plaintiff participate in psychotherapy with a licensed clinician for at least six months.

In September 2010, the union submitted a grievance on plaintiff's behalf contending that plaintiff had been "unjustly placed on administrative leave and subjected to" a fitness-for-duty evaluation. That grievance was denied.

In October 2010, plaintiff's attorney submitted a complaint to the UCSD counsel and requested an investigation into Gomez's conduct in dealing with plaintiff. The letter also alleged that Gomez and Santora had engaged in sexual harassment of plaintiff by constantly referring to her as "go-go[.]" The UCSD director of personnel then conducted an investigation of those complaints. During that investigation a number of individuals were interviewed, including plaintiff, Santora, Gomez, Cryan, the union representative, the processing unit supervisor, other sheriff's

officers, and clerical workers. The investigation report concluded that neither Gomez nor Santora violated any Union County policies against workplace harassment or discrimination.

After three months of treatment, plaintiff was returned to work and placed temporarily in the Sheriff's Labor Assistance Program division. In 2011, plaintiff was transferred to the transportation unit and her service weapon was returned to her. That same year, Santora was also placed in the transportation unit.

Plaintiff has continued her employment with UCSD. She was paid while on administrative leave. She also never experienced a decrease in pay as a result of any of her transfers, and none of the positions in which she worked was considered a demotion from the processing unit.

On January 3, 2012, plaintiff filed a complaint against defendants contending that defendants violated LAD. Thereafter, plaintiff filed an amended complaint adding claims for breach of contract.<sup>1</sup> In response to both the complaint and amended complaint, defendants notified plaintiff that they believed her

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<sup>1</sup> The trial court dismissed with prejudice the claims of breach of contract. Plaintiff has not pursued those claims on this appeal and, therefore, we deem those claims abandoned. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 155 n.2 (App. Div. 2005) (citing In re Certification of Need of Bloomingdale Convalescent Ctr., 233 N.J. Super. 46, 48 n.1 (App. Div. 1989)).

claims were frivolous and that they would seek sanctions and fees under Rule 1:4-8 and N.J.S.A. 2A:15-59.1 if the claims were not dismissed. The plaintiff did not dismiss her claims. Instead, the litigation proceeded and the parties engaged in discovery.

After the completion of discovery, defendants moved for summary judgment. The trial court heard oral arguments on October 24, 2014. With plaintiff's consent, the court dismissed the claims against defendant Froehlich with prejudice. On November 17, 2014, the court entered an order granting defendants' motion for summary judgment and dismissing with prejudice all of plaintiff's LAD claims.

In granting summary judgment to defendants, the court set forth the reasons for its ruling in a written opinion. The court held that plaintiff had not engaged in protected activity under LAD because her complaints concerning the September 16, 2010 incident did not involve discrimination. Instead, those complaints concerned co-workers making statements that annoyed plaintiff. The trial court also reasoned that plaintiff did not suffer any adverse employment action as a result of her complaints.

The trial court also dismissed plaintiff's claim of perceived discrimination. First, the court held that plaintiff had not identified any recognized disability that was perceived to exist. Moreover, the court went on to reason that Cryan gave valid reasons

for directing that plaintiff undergo a fitness-for-duty evaluation and plaintiff had produced no evidence to rebut those legitimate reasons. Finally, the court also reasoned that there was no adverse employment action taken against plaintiff because of any alleged perceived disability.

Thereafter, defendants moved to impose fees and sanctions on plaintiff under N.J.S.A. 2A:15-59.1 and Rule 1:4-8(d). The court denied that motion in an order entered on January 9, 2015.

## II.

On her appeal plaintiff makes three arguments: (1) the trial court improperly assumed the role of fact finder in granting summary judgment to defendants; (2) plaintiff's proofs establish a claim for retaliation in violation of LAD; and (3) plaintiff's proofs establish a claim of perceived disability discrimination in violation of LAD.

In reviewing a summary judgment order, we use a de novo standard of review and apply the same standard employed by the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Accordingly, we determine whether the moving party has demonstrated that there were no genuine disputes as to any material facts and, if not, whether the moving party is entitled to judgment as a matter of law. Id. at 405-06; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46. A dispute

of material fact is genuine if the "competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. The court should be guided by the same evidentiary standard of proof that would apply at trial when deciding whether a dispute is genuine. Id. at 533-34.

The LAD is remedial legislation designed to root out "the cancer of discrimination[.]" Battaglia v. United Parcels Serv., Inc., 214 N.J. 518, 546 (2013) (quoting Fuchilla v. Layman, 109 N.J. 319, 334, cert. denied, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988)). The act prohibits unlawful employment practices and discrimination in the form of harassment, "based on race, religion, sex, or other protected status, that creates a hostile work environment." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (citing Lehmann v. Toys-R-Us, Inc., 132 N.J. 587, 601 (1993)); see N.J.S.A. 10:5-12(a). The LAD also prohibits retaliation against an employee for opposing any act or practice that violates the LAD. Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 375 (2014); N.J.S.A. 10:5-12(d).

Here, plaintiff makes two claims under the LAD. First, she contends that she was unlawfully retaliated against. Second, she

argues that she was subject to discrimination in violation of LAD based on an erroneously perceived disability.

A. Retaliation Under the LAD

The LAD makes it illegal "[f]or any person to take reprisal against any person because that person has opposed any practice or acts forbidden under this act." N.J.S.A. 10:5-12(d). To establish a prima facie case of retaliation, a plaintiff must show that (1) he or she "'engaged in protected activity known to the [employer;]" [(2) he or she] was 'subjected to an adverse employment decision[;]' and [(3)] there [was] a causal link between the protected activity and the adverse employment action." Battaglia, supra, 214 N.J. at 547 (quoting Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)). Furthermore, "to recover for LAD retaliation, plaintiff must also demonstrate that the original complaint was both reasonable and made in good faith." Battaglia, supra, 214 N.J. at 546 (citing Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007)).

Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant "to articulate a 'legitimate[,] non-retaliatory reason' for the decision." Dunkley, supra, 437 N.J. Super. at 376 (alteration in original) (quoting Jameson v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (App. Div. 1990)). "If defendant satisfies this

burden, the plaintiff must then demonstrate that a retaliatory intent, not the employer's stated reason, motivated the employer's action, proving the employer's articulated reason was merely a pretext for discrimination." Dunkley, supra, 437 N.J. Super. at 376-77 (citations omitted).

"[A] person engages in a protected activity under the LAD when that person opposes any practice rendered unlawful under the LAD." Young v. Hobert W. Grp., 385 N.J. Super. 448, 466 (App. Div. 2005). To be a protected activity, the complaint must concern some act or practice that violates the LAD. Dunkley, supra, 437 N.J. Super. at 377. The LAD, however, has not "created a sort of civil code for the workplace where only language fit for polite society will be tolerated." Battaglia, supra, 214 N.J. at 549. Accordingly, a "general complaint of unfair treatment" does not state a claim under LAD. Dunkley, supra, 437 N.J. Super. at 377 (quoting Barber v. CSX Distribution Servs., 68 F.3d 694, 702 (3d Cir. 1995)).

Here, plaintiff relies on her report of the September 16, 2010 incident as the basis for her claim that she engaged in protected activity. Specifically, she alleges that she complained

about sexual harassment.<sup>2</sup> Plaintiff's September 16, 2010 incident report stated that Gomez, who is female, and Santora were saying "go-go" as she walked towards her desk. She also reported that Gomez was "laughing and throwing punches at" her. On its face, plaintiff's own handwritten report did not state any allegation of discrimination or harassment based on plaintiff's sex or any other protected class of persons under the LAD.

While conceding that her report makes no express reference to discrimination, harassment, or hostile work environment, plaintiff asserts that it should be inferred that she was alleging a hostile work environment and sexual harassment. She argues that because defendants were aware of her earlier verbal complaints about Santora and Gomez using the word "go-go" in her presence, the September 16, 2010 report should also be considered an "implied" complaint of sexual harassment. We disagree.

A critical element of a retaliation claim is that the protected activity must be "known" to the defendants. Battaglia, supra, 214 N.J. at 547. While plaintiff had previously complained about the use of the term "go-go," she had never pursued that

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<sup>2</sup> We note that plaintiff is limited to relying on incidents that took place after January 3, 2010 since she filed her complaint on January 3, 2012. See Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 362 (2016) (explaining that the LAD has a two-year statute of limitations).

claim as a sexual harassment claim; rather, she raised it with her union representative and ultimately decided not to formally pursue the matter even through the union. Accordingly, Cryan would have no way of understanding that "go-go" was a complaint about sexual harassment.

Alternatively, we also agree with the trial court that plaintiff was not subject to any adverse employment decision as a result of the September 16, 2010 incident. Plaintiff contends that she suffered five adverse employment actions: (1) a fitness-for-duty evaluation; (2) removal from the legal processing unit; (3) removal of her service weapon; (4) placing her on administrative leave; and (5) assigning her and Santora to the transportation unit.

A court must consider the particular facts of a case to determine whether a challenged employer action reaches the level of "adverse" under the LAD. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div.), certif. granted, 174 N.J. 359 (2002), remanded to 354 N.J. Super. 282 (App. Div. 2002). In so doing, the court should consider factors such as "the employee's loss of status, accounting of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees." Ibid.

Here, none of the actions taken by Cryan or the UCSD resulted in any negative effect on plaintiff's employment conditions. When plaintiff was placed on administrative leave pending the results of her fitness-for-duty evaluation, she was still paid her regular salary. She was then returned to work after beginning the recommended therapy and her service weapon was given back to her. Plaintiff presented no evidence that she was treated differently than any other sheriff's officer sent for a fitness-for-duty evaluation.

Moreover, none of plaintiff's transfers to other units involved a loss of pay, prestige, or responsibility. The UCSD's placement of Santora in the transportation unit also did not constitute an adverse employment action against plaintiff. Plaintiff herself testified that she has never been assigned to work directly with Santora and she only occasionally sees him. Thus, plaintiff has presented no evidence of a retaliatory motive by the fact that both she and Santora are in the same unit.

Plaintiff argues that the trial court erred by failing to consider defendants' requirement that she submit to a fitness-for-duty evaluation as an adverse employment action. Defendants, however, presented a legitimate reason for ordering the fitness-for-duty evaluation: Gomez perceived plaintiff's statements to her on September 16, 2010, as a physical threat. Such a threat by an

armed sheriff's officer presents a legitimate reason for having that officer evaluated.

Plaintiff's argument that there was a dispute whether Cryan also based the evaluation on hearing about defendants' allegation that her car had been bugged does not transform the evaluation into an adverse employment action. Similarly, plaintiff's argument that Cryan treated plaintiff differently because Gomez was not ordered to undergo an evaluation does not convert the evaluation into an adverse employment action. Gomez was an unarmed clerical employee and, thus, there was a legitimate reason to treat Gomez differently and not order her to undergo an evaluation.

In short, we agree with the trial court that plaintiff did not engage in any protected activity nor did she suffer any adverse employment action. Accordingly, defendants were entitled to summary judgment on plaintiff's claim of retaliation under the LAD.

#### B. Perceived Disability Under the LAD

To establish a prima facie case of disability discrimination under the LAD, a plaintiff must establish two elements. Victor v. State, 203 N.J. 383, 410 (2010). First, plaintiff must "demonstrate that he or she qualifies as an individual with a disability, or who is perceived as having a disability, as that has been defined by statute[;]" second, plaintiff must

"demonstrate that he or she is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation." Ibid. (citations omitted). The statutory definition of disability in the LAD "is not restricted to 'severe' or 'immutable' disabilities[,]" but does "require that the disabilities substantially limit a major life activity." Id. at 410 n.11 (quoting Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002)).

Here, plaintiff contends that defendants perceived her as having an unspecified psychological disability because Cryan was aware of the report prepared before plaintiff was initially hired. The problem with that argument, however, is that the pre-employment report specifically stated that plaintiff was "not mentally ill" and instead described her as having "personality problems." Thus, plaintiff failed to identify what disability Cryan erroneously believed that plaintiff suffered from. Without that element, plaintiff had not established a prima facie claim of perceived disability discrimination.

Moreover, for reasons that we have already explained, plaintiff has also not shown that there was any adverse employment action or decision taken as a result of the alleged perceived disability. The only action she has identified is the requirement that she undergo a fitness-for-duty evaluation. As already

analyzed, defendants have shown a legitimate reason for ordering that evaluation and plaintiff has presented nothing that would create a jury question that the legitimate reason was a pretext for discrimination.

In summary, the record developed after full discovery establishes that there was no material disputed issues of fact and defendants were entitled to judgment in their favor as a matter of law because plaintiff had failed to establish a prima facie case of either retaliation or perceived disability discrimination under the LAD.

### III.

In their cross-appeal, defendants argue that plaintiff's claims were frivolous and the trial court erred in not granting them fees and sanctions.

We review a trial judge's decision on an application for fees or sanctions under an abuse of discretion standard. United Hearts v. Zahabian, 407 N.J. Super. 379, 390 (App. Div.) (citing Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)), certif. denied, 200 N.J. 367 (2009). N.J.S.A. 2A:15-59.1 provides that a prevailing party in a civil action may be awarded reasonable costs and attorney's fees if the court finds that the complaint or defense of the non-prevailing party was frivolous. To be considered frivolous, the filing must be found to have been made

in "bad faith, solely for the purpose of harassment, delay or malicious injury[,]" or made "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b).

Rule 1:4-8(b) provides that a party may make a motion for sanctions against another party's attorney that has filed a paper with a court for a frivolous purpose. The rule goes on to provide certain procedures that must be followed in order to qualify. The rule also imposes limitations on the amount that can be imposed as a sanction. R. 1:4-8(b) and (d).

The conduct warranting sanctions under Rule 1:4-8 or fees under N.J.S.A. 2A:15-59.1 has been strictly construed and narrowly applied. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993); Wyche v. Unsatisfied Claims & Judgment Fund of N.J., 383 N.J. Super. 554, 560 (App. Div. 2006). Here, we find no abuse of discretion in the trial court's decision denying defendants' motion for sanctions and fees.

We affirm both on the appeal and cross-appeal.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION